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No. _____

In the Supreme Court of the United States

OCTOBER TERM, 1984

ROBERT LAHODNY,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. If this Court's pending decision in *Garrett v. United States,* No. 83-1842 would require dismissal under the Double Jeopardy Clause of a Continuing Criminal Enterprise charge after a conviction on a lesser included offense, does the Double Jeopardy Clause require dismissal of a Continuing Criminal Enterprise indictment following pleas of guilty to lesser included offense convictions under the conspiracy provisions of 21 U.S.C. §§846 and 963 and the substantive provision of 21 U.S.C. §841?

2. Under this Court's decision in *United States v. Raddatz,* 447 U.S. 667 (1980), does the defendant have the right to an evidentiary hearing at which he can present testimony, cross-examine prosecution witnesses who have filed declarations and subpoena witnesses and documents, where the trial court's findings as to the application of a due diligence exception to the double jeopardy protection are based on disputed facts relating to the time when the prosecution knew of the existence of the Continuing Criminal Enterprise offense and the prosecution's reasons for delaying the filing of the charge? If the defendant has no right to cross-examine or present evidence, are the district court's findings then reviewed by applying a standard of "clearly erroneous"?

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ROBERT LAHODNY,

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The Petitioner, Robert Lahodny, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINION BELOW

The memorandum decision of the circuit court is set forth in the attached Appendix.

JURISDICTION

The opinion of the Court of Appeals was filed August 8, 1984 and a petition for rehearing was denied November 9, 1984. This Court's jurisdiction is invoked pursuant to 28 U.S.C. §1254(1). This petition may be filed a few days beyond the general 30 day time limit. It is requested that any delay be excused by the overwhelming commitment of time and energy required by Petitioner's counsel to prepare and file appellate briefs, petitions for rehearing and an opposition to a motion to dismiss on appeal in the Ninth Circuit in *United States v. Vermouth,* C.A. No. 84-5111, (filed November 20, 1984), *DeMassa v. Nunez,* C.A. Nos.83-6271, 83-6363, 83-6470, 84-6359. In addition, Petitioner's counsel is engaged in preparing for a series of trials in the United States District Court for the Southern District of California, including (where approximately 320 pages of motions, exclusive of exhibits, were required to be filed on December 4), *United States v. DeMassa,* D.C. No. 84-0091-G, *United States v. Kolek,* D.C. No. 84-0144-K (a four month trial that is scheduled to begin on January 22, 1985), and *United States v. Warner,* D.C. No. 84-0553-K.

CONSTITUTIONAL PROVISION AND STATUTES

The Fifth Amendment to the United States Constitution and applicable statutes are set forth in the attached Appendix.

STATEMENT OF THE CASE

This case involves a series of indictments beginning in 1977 when Robert Lahodny and 25 others were indicted *inter alia* for conspiracy to possess with intent to distribute marijuana and to import marijuana. Pursuant to a plea agreement this indictment was dismissed. In Novem-

ber 1981, Petitioner was arrested and on August 3, 1982 was charged in an indictment containing conspiracy counts alleging violations of 21 U.S.C. §846 and §963 and a substantive count alleging a violation of 21 U.S.C. §841. In September 1982, Petitioner moved to dismiss the 1982 indictment on double jeopardy grounds. On October 25, 1982 the trial court denied this motion and Petitioner filed a Notice of Appeal from this order on November 2, 1982.

On April 5, 1982 Petitioner presented a Motion for Voluntary Dismissal of Appeal to the Hon. Alfred Goodwin of the Ninth Circuit with a request for an immediate issuance of the mandate. Judge Goodwin granted this motion and on April 6, 1983 Petitioner pled guilty to all charges in the 1982 indictment.[1] Subsequently, on August 24, 1983, the prosecution filed the instant multi-count indictment, No. 83-0789, which charges Petitioner with *inter alia* Count Thirteen charging a violation of 21 U.S.C. §848 (continuing criminal enterprise, hereinafter referred to as CCE). On September 28, 1983, Petitioner filed a Motion to Dismiss Count Thirteen which first raised this double jeopardy claim based on *Jeffers v. United States,* 432 U.S. 137 (1977). This claim is similar to the Double Jeopardy claim presently before this Court in *Garrett v. United States,* No. 83-1842, to the effect that the convictions on lesser included title 21 offenses bar the filing of a CCE indictment.

In response to the prosecution's assertion of the due diligence exception, the defense requested an evidentiary hearing on the prosecution's diligence (or lack thereof) in filing the CCE charge and served subpoenas on prosecu-

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[1]The district court accepted the plea despite prosecution requests for a continuance.

tion declarants requesting that these people testify at the October 14 hearing on the motion. The subpoenas also requested documents regarding the prosecution's actions, intent and knowledge underlying the delays in obtaining the CCE indictment from the grand jury.

At the hearing on October 14, 1983, the district court quashed the subpoenas and also an additional subpoena served on the prosecutor, Assistant U.S. Attorney Edwards, at the hearing in court, concluding that in spite of Petitioner's written and oral disputes as to most significant foundational facts, there were not disputed factual issues raised by the double jeopardy motion and that consequently there was no need for any testimony to be heard or government documents to be considered. On November 7, 1983, the district court denied the Petitioner's motion to dismiss and set out a series of findings of fact. On November 18, 1983, the district court filed and docketed an order denying the motion to dismiss the CCE count and the notice of the interlocutory appeal from this order was filed on November 25, 1983.

The circuit court affirmed this decision on August 8, 1984, on the basis of the due diligence exception[2] without any extended discussion of the district court's refusal to conduct an evidentiary hearing. The panel opinion merely stated that the district court could dispense with a hearing on contested factual issues because the lower court was "intimately familiar with the case." Appendix at A7. Despite the lack of any live testimony and a refusal to permit cross-examination of the prosecution declarants, the Ninth Circuit deferred to the district court's factual findings by applying the standard of "clearly erroneous."

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[2]The appellate court did not pass on the trial court's alternative ruling that Petitioner waived his double jeopardy rights by remaining silent when the prosecution sought a continuance of the April 5, 1983 guilty plea.

On November 9, 1984, the Ninth Circuit denied the petition for rehearing and suggestion for rehearing en banc. The trial in this matter is presently set for May 14, 1985.

STATEMENT OF THE FACTS

The legal issues in this case arise from the prosecution's attempt to separately prosecute and punish the CCE charge after obtaining convictions on the lesser included conspiracy and substantive predicate offenses under 21 U.S.C. §§841, 846 and 963. The propriety of separate prosecutions of CCE counts and the underlying predicate substantive offenses is presently at issue before this Court in *Garrett v. United States,* No. 83-1842 and this Court's decision in *Garrett* could be dispositive in the instant case. This court's decision in *Jeffers v. United States,* 432 U.S. 137 (1977) is dispositive as to the propriety of separate prosecutions of CCE counts and conspiracy counts. An additional issue in this case is the district court's refusal to conduct an evidentiary hearing on contested factual issues which were the basis for the lower court's denial of Petitioner's double jeopardy claim.

The contested factual issues included questions as to whether the prosecution's actions came within the due diligence exception. Petitioner sought to establish that the prosecution had sufficient evidence to file a CCE charge by March 1982 at the latest, and that the delay in filing the CCE charge could not be excused for the entire 18-month period in which that charge was not filed. By March 1982, the prosecution had secured evidence from two key informants, Weber and Logie, and financial records from the Petitioner's residences and accountant, which would have been sufficient to both indict and convict Petitioner of a CCE offense. *See* pp. 6-9, *infra.* Yet, the prosecution chose to do nothing for approximately a year and a half.

Inexplicably, the district court adopted the unfounded assumption that there was no dispute as to the factual issues and that contrary to the evidence offered by Petitioner, the prosecution did not have sufficient evidence of the CCE until November 1982. By arbitrarily assuming that there were no disputed issues, the district court prevented Petitioner from introducing oral testimony as to the prosecution's knowledge of the evidence and its reasons for delaying the filing of the CCE indictment.

1. Prosecution Knowledge of the CCE Offense

a. Evidence of petitioner's finances

The evidence of a CCE offense was compiled in the course of an investigation of a marijuana smuggling operation known as "The Coronado Company." This operation was a continuing group which began in 1973 and which engaged in 9 major smuggling ventures, of which 7 ventures are charged as the CCE predicate offenses. The operation effectively terminated in November 1981 and the arrests of Petitioner and his co-conspirators and the seizures of vast quantities of incriminating documents in addition to large caches of currency and marijuana. Appellant's Opening Brief (Ninth Circuit) at 13-15 (hereinafter cited as "AOB"). These documents explicitly set out Petitioner's partnership role in the smuggling venture and along with the discovery of huge amounts of cash and marijuana, established that Petitioner had derived hundreds of thousands of dollars from that venture.

The prosecution's November 5, 1981 search of the office of Petitioner's accountant, and the subsequent exhaustive investigation produced an analysis of Petitioner's finances which was so detailed that the prosecution was able to prepare a net worth tax case against Petitioner *before* receiving information from its supposed key witness,

Louis Villar. AOB at 15, 34. The accountant's records and interviews set out all of the receipts and disbursements for Petitioner's investments, as well as each of the major purchases, sales and loans. Appellant's Reply Brief at 6 (hereinafter cited as "ARB").[3]

With this information, the prosecution compiled the net worth analysis supplemented by a volumnious set of graphs, spread sheets, charts, records seized in November 1981 and reports of witness debriefings and interviews. AOB at 15-16. This analysis, contained in a Special Agent's Report, establishes that the government was aware of virtually all aspects of Petitioner's financial activities in the years 1979 and 1980. Although this evidence is unnecessary in a prosecution where Appellant was a ringleader in a smuggling conspiracy involving tons of marijuana and millions of dollars, it certainly was sufficient to raise factual issues as to the prosecution's diligence which should have been resolved at an evidentiary hearing.

b. Debriefings of prosecution witnesses

In late 1981 and early 198 , the prosecution had interviewed informants who supplied detailed accounts of the operations charged as the CCE predicate offenses and of Petitioner's role in the offenses. The first series of debriefings of informants who later became major prosecution witnesses was the December 1981 interviews of

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[3]Using the information from the search and interview of the accountant, the prosecution proceeded to interview in early 1982, virtually everyone having any significant business contacts with Petitioner. Prosecution investigators had even gone to the trouble of interviewing everyone connected with Petitioner's polo activities, including horse grooms, fellow players, club members and suppliers of hay. ARB at 7. The exhaustive investigation of Petitioner's finances had produced a minutely detailed picture of Petitioner's assets by March 1982 at the latest.

Lance Weber who described the 9 major offloading ventures and a number of smaller ventures. AOB at 9-10. Weber identified Petitioner as the owner of some of the marijuana loads. AOB at 10.[4].

The second informant to be interviewed was Alan Logie who was debriefed in December 1981, and March 1982. He described the 9 operations and Petitioner's involvement in 4 of the 9 operations. AOB at 10-12. Petitioner was listed as part owner of 4 loads, a participant in a large meeting of group members and as a person who ran the company with partners Louis Villar and Edward Otero. AOB at 11-12.[5]

The third major informant to be debriefed was Louis Villar, the mastermind of The Coronado Company, who

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[4]Weber described the operation of "The Coronado Company" which was formed in 1972 by Lance Weber, Paul Acree, Louis Villar, and Edward Otero. Weber claimed that this group evolved from a small marijuana smuggling operation to a large group which owned zodiac boats, a mothership, and other equipment. AOB at 9. Weber's report states that Petitioner was the owner of marijuana loads who arranged the The Coronado Company to offload and distribute shiploads of marijuana. The Coronado Company was paid one-third of the estimated sale price of the marijuana. Lahodny had sources in Thailand and in December 1976, arranged for the shipment of two tons of Thai marijuana on the sailboat Pai Nui. AOB at 10.

[5]Logie was able to account for 9 of the smuggling operations of "The Company" between 1975 and 1981 of which 7 operations constitute the basis for all of the predicate offenses of the CCE count. Logie's debriefing report describes Petitioner's involvement in 4 of the 9 smuggling operations undertaken by "The Company." In most of the operations, Petitioner was said to have hired "The Company" to offload marijuana purchased by Petitioner, giving "The Company" 30 to 33 1/3 per cent of the selling price of the marijuana as payment for its service. AOB at 11. Petitioner was also involved in an October 1980 meeting at a La Costa condominium. At this meeting, Petitioner, Villar and Otero conducted a critique of the Neah Bay operation and the resulting loss of tons of marijuana, with the entire landing crew. *Id.* at 12.

was interviewed from August 30 to September 17, 1982. Villar stated that Petitioner was a managing partner of the enterprise who assumed this status upon paying $85,000 in March 1977. AOB at 13.[6]

c. Prosecution's representations

While engaging in an inexplicable pattern of delay in filing the CCE charge, the prosecution continually represented to Petitioner and the district court that a CCE indictment would be filed against Petitioner. Prosecutors made a series of representations that a CCE count would be filed against Petitioner beginning in November 1981 when threats were uttered to Richard Barnett, and continuing up to October 1982, AOB at 18.

2. District Court Findings

The district court denied the Petitioner's double jeopardy motion based on findings of fact on disputed issues reached without taking any testimony and without permitting cross-examination of the prosecution witnesses who submitted declarations that were the basis of the court's findings and denying the defense the opportunity to call witnesses or to compel disclosure of government documents setting out the extent of the government's knowledge of the CCE offense and its reasons for delaying the filing of the CCE indictment. In quashing defense subpoenas for such testimony and documents, the district court concluded that there were no disputed factual issues and then proceeded to resolve all the factual conflicts in favor of the

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[6]Villar stated that Petitioner joined "The Company" as a partner in March 1977 when Petitioner paid $85,000. From this point on, Villar, Otero and Petitioner were the managing partners of the enterprise. Villar described five subsequent operations run by the partnership that were previously discussed by Weber and Logie. AOB at 13.

prosecution. Appellant's Excerpt of Record (Ninth Circuit) at 226 (hereinafter cited as E.R.).

The district court ruled that there was no need for testimony as to the prosecution's knowledge and intent before November 1982, asserting that the undisputed evidence established that the government had enough evidence to convict Petitioner of a CCE offense in October 1982. E.R. at 226-227. In making this finding, the court ignored the defense offers of proof and relied solely on government declarations without permitting cross-examination of the declarants and disregarded repeated defense claims that it could establish that the government could have filed the CCE charge long before October 1982. The lower court also found that from the time the conspiracy indictment was filed in August 1982, the government was indicating that it would file a CCE indictment. E.R. at 349. As a further finding, the district court concluded that the government was aware of the CCE offense when it filed the conspiracy indictment on August 3, 1982, but could not have convicted Petitioner without the information provided by Louis Villar. E.R. at 202. The necessity of obtaining Villar's testimony to establish a §848 violation was strongly disputed by Petitioner. E.R. at 199. The court also found that the records seized in November 1981 made the government aware of the CCE offense. E.R. at 199. Notwithstanding these findings, the district court regarded any delay between August 1982 and November 4, 1982 as irrelevant because Petitioner made no attempt to plead guilty during that time. E.R. at 314-15. In the lower court proceedings, Petitioner vigorously disputed the basis of the district

court's factual findings and insisted on an evidentiary hearing as to a number of factual issues.[7]

Based on a factual assumptions reached without the benefit of Petitioner's evidence, the court determined that the prosecution had sufficient evidence of a CCE offense sometime in October or November of 1982, and concluded that the due diligence exception was applicable up to the time of the filing of the notice of appeal on the first double jeopardy claim in November 1982. The court ruled that it was reasonable for the prosecution to wait after November 1982 until the first double jeopardy appeal was resolved.[8]

3. Decision of the Appellate Panel

The appellate panel upheld the district court's finding of due diligence under the "clearly erroneous" standard of appellate review. The panel opinion contains only one brief paragraph dealing with the standard of review and the lack of an evidentiary hearing:

> We review the district court's findings of fact on the due diligence issue under a clearly erroneous

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[7]In the pleadings and at argument, the Petitioner set out numerous factual contentions which sharply conflict with the district court's findings: (1) contrary to the district court's finding that the prosecution had insufficient evidence of a CCE offense before August 1982, Petitioner flatly refused to stipulate to that fact, E.R. at 202, and repeatedly offered in his pleadings and at oral argument to show that the prosecution had sufficient evidence of a CCE offense before August 1982, ARB at 23; (2) contrary to the district court's finding that the prosecution acted with reasonable motives, E.R. at362, 364, the defense repeatedly contended in the pleadings and oral argument that the government's real motives were at issue, ARB at 23-24, and (3) Petitioner contended in the pleadings and oral argument that the Justice Department gave oral approval a considerable time before the written approval in November 1982, ARB at 24.

[8]In fact, there were serious questions as to whether the prosecution's motive revolved around waiting for the appeal since the CCE charge was filed four months after the April 1983 dismissal of the appeal.

> standard. *United States v. Stearns,* 707 F.2d 391, 394 (9th Cir. 1983), *cert. denied,* 104 S.Ct. 720 (1984). Here, although the district court did not conduct a formal evidentiary hearing on the due diligence issue, the court was intimately familiar with the case, having presided over a number of earlier proceedings. The clearly erroneous review standard is thus appropriate here.

Appendix at A7. No precedent or reasoning is offered for the panel's theory that the district court could dispense with a hearing on contested factual issues because it was "intimately familiar with the case" nor did the panel explain why the "clearly erroneous" standard applies to district court findings reached without a hearing.

I

THIS COURT'S PENDING DECISION IN *GARRETT V. UNITED STATES* AND ITS PRIOR DECISION IN *JEFFERS V. UNITED STATES* MAY BE DISPOSITIVE AS TO THE PROPRIETY OF SEPARATE PROSECUTION OF A CCE CHARGE AND LESSER INCLUDED FELONY DRUG OFFENSES

In *Garrett v. United States,* No. 83-1842, this Court is presently considering questions relating to the propriety of successive prosecutions of a CCE charge and an underlying predicate substantive felony drug offense. *Garrett* could conclusively decide the applicability of the double jeopardy protection to cases such as the instant one in which a CCE prosecution follows convictions on Title 21 substantive offenses which are alleged to be part of the same transaction or series of transactions as the CCE offense. Since *Garrett* may be controlling in this case, this petition for a writ of certiorari should be granted if *Garrett* would

establish the impropriety of separate prosecutions of the CCE charges and the lesser included felony drug offenses.

This court's decision in *Jeffers v. United States,* 432 U.S. 137 (1977) should establish the impropriety of the separate indictments of the CCE charge and the lesser included conspiracy charges under 21 U.S.C. § § 846 and 963.

II

THE DISTRICT COURT'S REFUSAL TO CONDUCT AN EVIDENTIARY HEARING IN VIOLATION OF DUE PROCESS AND THE DOUBLE JEOPARDY CLAUSE CANNOT BE JUSTIFIED BY THE THEORY THAT THE DISTRICT COURT WAS "INTIMATELY FAMILIAR" WITH THE CASE

Contrary to prevailing practice in double jeopardy litigation and basic principles of due process as construed in this Court's opinions in *United States v. Raddatz,* 447 U.S. 667 (1980), the district court refused to conduct an evidentiary hearing at which the Petitioner could offer testimony, cross-examine prosecution declarants and subpoena witnesses and documents. It predicated this refusal on the belief that there were no disputed factual issues, an assumption that was belied by the numerous factual disputes pointed out by the defense that the court later resolved in favor of the prosecution. The opinion of the Ninth Circuit has now affirmed this decision not because the evidence was undisputed but under an unprecedented theory that an evidentiary hearing as to disputed facts was unnecessary because the district court was "intimately familiar" with the case. The circuit then proceeded to review the findings from this type of hearing under the clearly erroneous standard. This "intimate familiarity" theory is not only unsupported by logic or precedent but contravenes well-established principles of jurisprudence.

As a general principle, this Court has long recognized that "[o]ne of the essential elements of the determination of the crucial facts is the weighing and appraising of the testimony." *Holiday v. Johnston,* 313 U.S. 342, 352 (1941). Due process requires that all parties be afforded an opportunity to confront and cross-examine adverse witnesses when "important decisions turn on questions of fact." *Goldberg v. Kelly,* 397 U.S. 254, 269 (1970). In these situations, confrontation and cross-examination of witnesses are essential elements of a meaningful hearing because cross-examination is the principal means by which the believability of a witness and the truth of his testimony are tested. *Davis v. Alaska,* 415 U.S. 308, 315-16 (1964). Hearings based only on affidavits are not an adequate substitute for evidentiary hearings with live testimony and cross-examination. *See generally Matthews v. Eldridge,* 424 U.S. 319, 345-45 (1976). Consequently, the courts have required evidentiary hearings on pretrial motions in criminal cases when those motions raise factual issues. *Cohen v. United States,* 378 F.2d 751, 761 (9th Cir. 1967) (noting that affidavits "are no substitute for competent proof when factual issues are properly raised"). *See also United States v. Green,* 670 F.2d 1148, 1154 (D.C.Cir. 1981) (due process requires cross-examination of witnesses at pretrial suppression hearings.)[9] The evidentiary hearing requirement is fully applicable to

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[9]This court has not directly considered the question of whether evidentiary hearings are required on pretrial motions in criminal cases. This court's plurality decision in *United States v. Raddatz,* 447 U.S. 667 (1980), strongly indicates that resolution of factual disputes on pretrial motions cannot be resolved without considering live testimony at some point in the litigation process. In *Raddatz,* this court permitted a trial judge to affirm a magistrate's finding as to a suppression motion where the magistrate heard live testimony but the district court did not. In contrast, this case involves a district court's resolution of disputed factual issues without any live testimony being

double jeopardy motions. *See United States v. Inmon,* 568 F.2d 326, 333 (3d Cir. 1977) (remanding to district court for an evidentiary hearing on double jeopardy claim.)[10] In one of the few published cases on the due diligence issue, *United States v. Walker,* 546 F.Supp. 805, 806 (D.Haw. 1982), *aff'd,* 707 F.2d 391 (9th Cir. 1983), the district court specifically noted that it considered oral testimony of government agents as to their investigation and received that testimony over the objections of the defense.

In the instant case, the appellate court's only explanation of the trial court's refusal to conduct an evidentiary hearing was the amorphous notion that the trial court was "intimately familiar" with the case. Appendix at A7. Certainly, the lower court was not familiar with the case in the sense that it could directly observe the major issue, i.e. the prosecution's knowledge of the CCE offense and the prosecution's motive. The panel's theory undermines the double jeopardy protection by permitting district courts to find exceptions to that right while denying the defendant the right to present critical evidence. Under this novel doctrine, a determination reached after this type of hearing will not be reversed unless it is clearly erroneous.

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footnote 9 cont.
considered at any point. Under the dissenting opinions as well as the plurality decision in *Raddatz,* the failure to hold an evidentiary hearing in this case was improper. The plurality decision recognized that serious questions would arise if the district judge were to reject a magistrate's findings and substitute the judge's own findings without considering live testimony. *Id.* at 682 n. 7. *See also United States v. Bergera,* F.2d 391, 393 (9th Cir. 1975) (holding that the trial court erred in denying a motion to suppress evidence against a magistrate's recommendation without holding an evidentiary hearing. The court stressed the importance of holding evidentiary hearings when important legal rights are at issue).

[10]*Cf. United States v. Buonos,* 693 F.2d 38 (7th Cir. 1982) (holding that the defendant could testify in support of his double jeopardy claim without waiving any Fifth Amendment rights).

This unprecedented approach to resolving significant constitutional questions should be soundly rejected.

CONCLUSION

For all of the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

LAW OFFICES OF BARRY TARLOW

BARRY TARLOW

APPENDIX

App. 1

APPENDIX

UNITED STATES CONSTITUTION
AMENDMENT 5

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger: nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

21 U.S.C. §841(a)

§841 *Prohibited acts A*

(a) *Unlawful acts.* Except as authorized by this title, it shall be unlawful for any person knowingly or intentionally–

(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance; or

(2) to create, distribute or dispense, or possess with intent to distribute or dispense, a counterfeit substance.

21 U.S.C. §846

§846. *Attempt and conspiracy*

Any person who attempts or conspires to commit any offense defined in this title is punishable by imprisonment or fine or both which may not exceed the maximum punishment prescribed for the offense, the commission of which was the object of the attempt or conspiracy.

APPENDIX A

21 U.S.C. §848(a), (b)

§848 *Continuing criminal enterprise*

(a) *Penalties; forfeitures.* (1) Any person who engages in a continuing criminal enterprise shall be sentenced to a term of imprisonment which may not be less than 10 years and which may be up to life imprisonment, to a fine of not more than $100,000, and to the forfeiture prescribed in paragraph (2); except that if any person engages in such activity after one or more prior convictions of him under this section have become final, he shall be sentenced to a term of imprisonment which may not be less than 20 years and which may be up to life imprisonment, to a fine of not more than $200,000, and to the forfeiture prescribed in paragraph (2).

(2) Any person who is convicted under paragraph (1) of engaging in a continuing criminal enterprise shall forfeit to the United States —

(A) the profits obtained by him in such enterprise, and

(B) any of his interest in, claim against, or property or contractual rights of any kind affording a source of influence over, such enterprise.

(b) *"Continuing criminal enterprise" defined.* For purposes of subsection (a), a person is engaged in a continuing criminal enterprise if—

(1) he violates any provision of this title or title III the punishment for which is a felony, and

(2) such violation is a part of a continuing series of violations of this title or title III—

(A) which are undertaken by such person in concert with five or more other persons with respect to whom such person occupies a position of organizer, a supervisory position, or any other position of management, and

(B) from which such person obtains substantial income or resources.

21 U.S.C. §952(a)

§952. *Importation of controlled substances*

(a) *Controlled substances in schedule I or II and narcotic drugs in schedule III, IV, or V; exceptions.* It shall be unlawful to import into the customs territory of the United States from any place outside thereof (but within the United States), or to import into the United States from any place outside thereof, any controlled substance in schedule I or II of title II, or any narcotic drug in schedule III, IV, or V of title II,

21 U.S.C. 960(a)

§960. *Prohibited acts A*

(a) *Unlawful acts.* Any person who —

(1) contrary to section 1002, 1003, or 1007 [21 USCS § §952, 953, 957], knowingly or intentionally imports or exports a controlled substance,

(2) contrary to section 1005 [21 USCS §955], knowingly or intentionally brings or possesses on board a vessel, aircraft, or vehicle a controlled substance, or

(3) contrary to section 1009 [21 USCS §959], manufactures or distributes a controlled substance,

shall be punished as provided in subsection (b).

21 U.S.C. §963

§963 *Attempt and conspiracy*

Any person who attempts or conspires to commit any offense defined in this title is punishable by imprisonment or fine or both which may not exceed the maximum punishment prescribed for the offense, the commission of which was the object of the attempt or conspiracy.

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CLERK, U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Appellee, vs. ROBERT KENT LAHODNY, Appellant.	No. 83-5291 D.C. No. CR-83-789-K MEMORANDUM*

On Appeal from the United States District Court
for the Southern District of California
Hon. Judith N. Keep, Judge Presiding
Argued and submitted June 8, 1984

Before: WALLACE, PREGERSON, and ALARCON, Circuit Judges.

In a pre-trial order, the district court denied appellant Robert Kent Lahodny's motion to dismiss the continuing criminal enterprise count (21 U.S.C. §848) of a multi-count indictment on the grounds of double jeopardy. Lahodny filed this interlocutory appeal. We affirm.

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* The panel has concluded that this appeal presents issues that do not meet this court's standards for disposition by written opinion. *See* 9th Cir. R. 21. Therefore, we order disposition by memorandum rather than by publication in the *Federal Reporter.* This memorandum may not be cited to or by the court of this circuit.

FACTS

In 1977, Lahodny was indicted, *inter alia,* for conspiracy to possess with intent to distribute marijuana and to import marijuana. The indictment was dismissed in 1979 when Lahodny pleaded guilty to possession of marijuana in violation of 21 U.S.C. §844. He received a five year probationary sentence.

In 1981, Lahodny was arrested in the company of fugitives from the 1977 indictment. After a hearing, the district court revoked Lahodny's probation and sentenced him to one year in prison.

In 1982, a grand jury indicted Lahodny, *inter alia,* for conspiracy to possess with intent to distribute marijuana and to import marijuana between 1977 and 1982.

On September 16, 1982, Lahodny moved to dismiss the conspiracy charges on grounds of double jeopardy, contending that the charges were identical to those in the 1977 indictment. The district court denied the motion in an order entered on October 26, 1982. On the same day, the United States Attorney made a written request to the United States Department of Justice, per Justice Department regulations, to charge Lahodny with a violation of the continuing criminal enterprise statute, 21 U.S.C. §848. The request was granted on November 4, 1982, after Lahodny had filed an interlocutory appeal in the conspiracy case on the double jeopardy issue.

On April 5, 1983, the day before the scheduled appellate argument, pursuant to an ex parte emergency motion, Lahodny requested and received from this court an order dismissing his appeal and immediately remanding the case to the district court. On the same day, Lahodny's counsel informed the government of the dismissal of the appeal and Lahodny's intention to plead guilty to each count of the 1982 indictment. The govern-

ment attorney then informed Lahodny's counsel of the government's intention to pursue the continuing criminal enterprise charge.

Lahodny sought to plead guilty in district court on April 6, 1983. The government moved to continue the proceedings one week to allow it to present a superceding indictment to the grand jury that would include a continuing criminal enterprise charge. The government's motion was denied and Lahodny was allowed to plead guilty.

On August 24, 1983, a grand jury indicted Lahodny for, *inter alia,* violation of the continuing criminal enterprise statute.

DISCUSSION

The government acknowledges that the 1982 conspiracy charges against Lahodny are lesser included offenses with respect to the continuing criminal enterprise charge. The government, however, contends that the double jeopardy clause does not apply because, despite the exercise of due diligence, the government did not have sufficient evidence to indict Lahodny on a continuing criminal enterprise charge when the 1982 indictment was returned. The government also contends that Lahodny waived his double jeopardy rights.

In *Brown v. Ohio,* 432 U.S. 161, 169 n.7 (1977), the Supreme Court noted that an exception to the double jeopardy rule may exist where the government cannot proceed on the more serious charge at the outset of prosecution because, despite the exercise of due diligence, the additional facts necessary to sustain the more serious charge have not been discovered. *See also Jeffers v. United States,* 432 U.S. 137 (1977); *United States v. Solano,* 605 F.2d 1141 (9th Cir. 1979), *cert. denied,* 444 U.S. 1020 (1980).

We review the district court's findings of fact on the due diligence issue under a clearly erroneous standard. *United States v. Stearns,* 707 F.2d 391, 394 (9th Cir. 1983), *cert. denied,* 104 S. Ct. 720 (1984). Here, although the district court did not conduct a formal evidentiary hearing on the due diligence issue, the court was intimately familiar with the case, having presided over a number of earlier proceedings. The clearly erroneous review standard is thus appropriate here.

Lahodny was indicted on conspiracy charges in August 1982. The district court found that it was not until October 1982 that the government obtained information showing that Lahodny was a principal actor in the drug smuggling operation under investigation. And it was not until November 4, 1982 that the government, following internal procedures, had sufficient evidence and Justice Department permission to file a continuing criminal enterprise charge. Nothing Lahodny has presented to this court indicates that the district court's findings are erroneous—i.e., that the government, despite due diligence, had insufficient evidence to seek an indictment charging a continuing criminal enterprise before November 1982.

From November 1982 until he pleaded guilty to the conspiracy charges in April 1983, it was Lahodny's actions that frustrated the government in regard to filing the continuing criminal enterprise charge. On November 2, 1982, Lahodny filed an interlocutory appeal to this court on his double jeopardy claim regarding the 1982 conspiracy case. The district court found that it was not until November 4, 1982 that the United States Attorney was in a position to proceed with the continuing criminal enterprise indictment.

As the district court observed, it would have been a waste of time for the government to have filed the criminal

enterprise charge during the pendency of the double jeopardy appeal. A ruling against the government on the conspiracy appeal would have precluded prosecution of the criminal enterprise charge.

Then, Lahodny, acting one day before the scheduled appellate argument, without notice to the government, took the government by surpirse by withdrawing his appeal and pleading guilty. The government unsuccessfully sought a continuance to file a superceding indictment that would have included the continuing criminal enterprise charge.

In short, Lahodny's actions prevented the government from trying the conspiracy and continuing criminal enterprise charges together. Where, as here, prosecutorial or judicial overreaching has not forced a defendant's hand, defendant may not rely on his actions to create a double jeopardy claim. *See Ohio v. Johnson,* 52 U.S.L.W. 4748, 4750 (U.S. June 11, 1984); *Lee v. United States,* 432 U.S. 23, 27-28 (1977); *United States v. Dinitz,* 424 U.S. 600, 611 (1976); *see also United States v. Scott,* 437 U.S. 82, 99 (1978).

The continuing criminal enterprise charge is not barred by double jeopardy. The government acted with due diligence in discovering evidence on that charge but was delayed in instituting the charge by Lahodny's own actions. Accordingly, we need not consider the waiver issue.

The district court's holding is AFFIRMED. Our mandate is to issue immediately.

PROOF OF SERVICE BY MAIL

State of California

ss.

County of Los Angeles

I, the undersigned, say: I am and was at all times herein mentioned, a citizen of the United States and a resident of the County of Los Angeles, over the age of eighteen (18) years and not a party to the within action or proceeding; that my business address is 11333 Iowa Avenue, Los Angeles, California 90025; that on December 21, 1984, I served the within *Petition for A Writ Of Certiorari* in said action or proceeding by depositing true copies thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Los Angeles, California, addressed as follows:

Clerk, U.S. Supreme Court
One First Street, N.W.
Washington, D.C. 20543
(Original and forty copies)

Solicitor General
Department of Justice
Washington, D.C. 20530

Raymond Edwards, Jr., U.S. Attorney
U.S. Attorney's Office
U.S. Courthouse, Room 5-N-19
940 Front Street
San Diego, California 92189

I declare under penalty of perjury that the foregoing is true and correct. Executed on December 21, 1984, at Los Angeles, California.

Joy Rivelli Miller
(Original signed)

Office-Supreme Court, U.S.
FILED
FEB 22 1985
ALEXANDER L. STEVAS,
CLERK

No. 84-997 (2)

In the Supreme Court of the United States

OCTOBER TERM, 1984

ROBERT LAHODNY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Double Jeopardy Clause bars the continuing criminal enterprise charge in this case on the ground that petitioner had previously pleaded guilty to related drug offenses, where the CCE charge could not have been included in the prior indictment and petitioner insisted on entering his guilty plea despite the government's request for a one-week continuance that would have allowed all of the charges to be resolved in one proceeding.

2. Whether the district court erred in declining to conduct a formal evidentiary hearing, including discovery and the presentation and cross-examination of witnesses, on petitioner's double jeopardy claim.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The memorandum opinion of the court of appeals (Pet. App. A4-A8) is unreported.

JURISDICTION

The judgment of the court of appeals (Pet. App. A4) was entered on August 8, 1984. A petition for rehearing was denied on November 9, 1984. The petition for a writ of certiorari was filed on December 24, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

In this case petitioner is charged with, inter alia, engaging in a continuing criminal enterprise (CCE), in violation of 21 U.S.C. 848. The district court denied petitioner's pre-trial motion to dismiss the CCE count on double jeopardy grounds, and, on petitioner's interlocutory appeal, the court of appeals affirmed (Pet. App. A4-A8).

1. In December 1977, an eight-count indictment returned in the Southern District of California charged petitioner with, among other offenses, conspiracy to import marijuana and conspiracy to possess marijuana with intent to distribute it, in violation of 21 U.S.C. 846 and 963. Pursuant to a plea agreement, petitioner pleaded guilty to a superseding information charging him with possession of marijuana, in violation of 21 U.S.C. 844. He was sentenced to a term of five years' probation and a fine of $500. Following petitioner's plea, the original indictment was dismissed as to him.

In November 1981, petitioner was arrested while in the company of fugitives from the 1977 indictment. After a hearing, the district court revoked petitioner's probation and sentenced him to one year's imprisonment.

On August 3, 1982, petitioner was indicted in the Southern District of California for conspiracy to possess more than 1000 pounds of marijuana with intent to distribute it, conspiracy to import marijuana, and possession of 3000 pounds of marijuana with intent to distribute it, in violation of 21 U.S.C. 841(a)(1), 846, and 963. In September 1982, petitioner moved to dismiss the two conspiracy counts on the ground that they involved the same conspiracies that had been charged in the 1977 indictment and therefore were barred by the Double Jeopardy Clause. The district court denied this motion on October 26, 1982, and petitioner filed a notice of appeal on November 2.

In addition, on October 26, 1982, the United States Attorney made a written request to the Department of Justice, pursuant to departmental requirements (see U.S. Dep't of Justice, *United States Attorney's Manual* § 9-100.280, at 39 (Mar. 9, 1984)), for authority to bring a CCE charge against petitioner. This request was based in part on information that the government had obtained in September and October of 1982 from co-defendant Louis

Villar, who had agreed to cooperate with the prosecution in order to receive a reduced sentence. The Department granted the United States Attorney's request to proceed on November 4, 1982.

Petitioner's appeal from the denial of his motion to dismiss was scheduled for oral argument in the court of appeals on April 6, 1983. However, on April 5, petitioner submitted an ex parte emergency motion to dismiss the appeal and to order the mandate to be issued forthwith. This motion was granted on April 5. Petitioner's counsel then notified the Assistant United States Attorney that the appeal had been dismissed and that petitioner intended to plead guilty to the pending charges. The Assistant United States Attorney informed counsel of the government's intention to pursue the CCE charge.

On April 6, petitioner sought to plead guilty to the three conspiracy and possession counts in the 1982 indictment. The government objected and requested a continuance of one week in order to obtain a superseding indictment that would add a CCE charge. Petitioner responded that he was there to plead guilty and wished to enter a plea to all charges (Tr. 194). The government's request for a continuance was denied, and petitioner pleaded guilty to the conspiracy and possession counts. Petitioner was eventually sentenced to a term of four years' imprisonment.

2. In August 1983, a grand jury in the Southern District of California returned a multiple-count indictment against petitioner. Count 13 of the indictment charged petitioner with engaging in a continuing criminal enterprise. As the predicate "continuing series of violations" for the CCE count (see 21 U.S.C. 848(b)(2)), the indictment alleged 14 substantive drug offenses, including the possession offense charged in the 1982 indictment; no drug conspiracy was included as a predicate offense.

In September 1983, petitioner moved to dismiss the CCE count on grounds of double jeopardy in light of his guilty plea to the 1982 indictment. In addition, petitioner served ten subpoenas on the United States Attorney, several Assistant United States Attorneys and DEA agents, and others.

On October 14, 1983, the district court took evidence and heard argument on petitioner's motion to dismiss the CCE count. The district court also quashed the defense subpoenas. On November 7, the court denied petitioner's double jeopardy motion on two grounds (Tr. 189-208).

First, relying on *Brown* v. *Ohio*, 432 U.S. 161, 169 n.7 (1977), the district court found that at the time of the 1982 indictment the government, despite the exercise of due diligence, did not have sufficient evidence to prosecute petitioner for CCE. Indeed, the court specifically stated that the government's case would have been insufficient to avoid a motion for judgment of acquittal under Fed. R. Crim. P. 29 based on lack of evidence (Tr. 40-42, 68, 191-192). However, by November 1982, after the United States Attorney had obtained additional information from Villar and had received the necessary authority to proceed from the Department of Justice, the government had adequate evidence to pursue the CCE prosecution (Tr. 191-202). These determinations were based both on the record in this case and in petitioner's 1977 and 1982 cases[1] and on the court's experience in presiding over two trials involving petitioner's co-conspirators (Tr. 11-12).

Second, relying on *Jeffers* v. *United States*, 432 U.S. 137 (1977), the district court also held that petitioner had waived his right against double jeopardy (Tr. 205-208):

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[1]At the request of the parties, the records in the preceding prosecutions were incorporated by reference in this case for purposes of petitioner's motion to dismiss (Tr. 187).

> By the ex parte and sudden and unexpected withdrawal of his interlocutory appeal the day before oral argument, and by having the mandate hand-carried to the Court the next day and requesting his right to plead guilty, even though the Government sought a one-week continuance in order to obtain the superseding indictment, [petitioner] took the prosecution by surprise and gave up his claim to have both the continuing criminal enterprise count and the conspiracy counts heard by the same trier of fact in the same trial.
>
> * * * * *
>
> By requesting to proceed with his change of plea of guilty [petitioner], in effect, opposed the Government's request for a one-week continuance so that [he] could be tried for both the continuing criminal enterprise count and the conspiracy counts at one time.
>
> Thus, [as in *Jeffers*, a] defendant who makes tactical decisions which result in a charge for a greater offense necessarily being prosecuted separately from the lesser offense may not hide behind the screen of double jeopardy to claim Government oppression.

Finding that petitioner had been "well aware of the Government's intent to seek a continuing criminal enterprise indictment" and that the government's actions "were not only reasonable but responsible," the court concluded that petitioner's "strategic[] choice" constituted a waiver of double jeopardy (*ibid.*).

3. On petitioner's interlocutory appeal, the court of appeals affirmed in an unpublished memorandum decision (Pet. App. A4-A8). The court of appeals noted that the district court "was intimately familiar with the case, having presided over a number of earlier proceedings" (*id.* at A7), and it sustained the district court's findings that "[t]he

government acted with due diligence in discovering evidence on [the CCE charge] but was delayed in instituting the charge by [petitioner's] own actions" (*id.* at A8). Because petitioner's "actions prevented the government from trying the conspiracy and continuing criminal enterprise charges together," and because there was no "prosecutorial or judicial overreaching" (*ibid.*), the court held that double jeopardy did not bar the CCE count in this case.

ARGUMENT

Petitioner contends that the Double Jeopardy Clause bars the present CCE charge in light of his guilty plea to the substantive and conspiracy offenses in the 1982 indictment. This contention does not warrant further review.

1. Noting that the issue is currently before the Court in *Garrett* v. *United States*, No. 83-1842 (argued Jan. 16, 1985), petitioner asserts (Pet. 12) that successive prosecutions are impermissible for CCE and a substantive drug crime that serves as a predicate for the CCE offense. However, as we explain in our brief in *Garrett* (at 5, 13-14),[2] this argument, even if correct, would not preclude the CCE prosecution altogether but instead would require at most a limitation on the use that could be made in the CCE trial of the evidence concerning that substantive predicate offense; provided that such evidence is introduced for purposes other than to establish the necessary series of violations, no double jeopardy issue would arise. Here, petitioner has not yet been tried on the 1983 indictment, and the CCE count rests on 13 substantive predicate offenses in addition to the possession of marijuana that was charged in the 1982 indictment to which petitioner pleaded guilty. Accordingly, his double jeopardy claim will be directly affected — and perhaps eliminated entirely — by the further proceedings to

[2]A copy of our brief in *Garrett* is being sent to counsel for petitioner.

be held in the district court. In these circumstances, it would be premature for the Court at this stage to consider petitioner's argument, which, while premised on principles of double jeopardy, essentially seeks an anticipatory ruling on the uses to which certain government evidence may be put at trial. Indeed, a "double jeopardy" claim of this nature, because it does not affect the government's right to try petitioner, is not appealable prior to trial under *Abney* v. *United States*, 431 U.S. 651 (1977).[3]

2. In any event, there is no merit to petitioner's double jeopardy claims. Even assuming, as he urges (Pet. 12-13), that successive prosecutions may not ordinarily be brought for CCE and substantive predicate offenses (see *Garrett* v. *United States, supra*) or for CCE and an interrelated drug conspiracy (see *Jeffers* v. *United States*, 432 U.S. 137, 147-151 (1977) (plurality opinion)), the Double Jeopardy Clause would not bar the CCE charge in this case.

First, as this Court has recognized (see U.S. *Garrett* Br. 42-43), the Constitution does not prohibit successive prosecutions where the government "is unable to proceed on the more serious charge at the outset because the additional facts necessary to sustain that charge * * * have not been discovered despite the exercise of due diligence." *Brown* v. *Ohio*, 432 U.S. 161, 169 n.7 (1977). Both courts below correctly concluded that this case falls within the "due diligence" exception.[4] When the August 1982 indictment

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[3]We are also advised that petitioner did not raise the *Garrett* issue in the courts below but rather argued solely that the CCE count was barred by his guilty plea to the conspiracy counts in the 1982 indictment. Thus, it appears that petitioner failed to preserve for review the question of the relation between CCE and substantive predicate offenses.

[4]We note that the Court has recently declined to review another decision of the Ninth Circuit involving the "due diligence" exception. See *United States* v. *Stearns*, 707 F.2d 391 (1983), certs. denied, Nos. 83-5511 & 83-5565 (Jan. 9, 1984).

was returned against petitioner, a CCE count could not have been included. Rather, it was not until the United States Attorney obtained information from a cooperating co-conspirator in September and October 1982, and based on that information received the necessary approval to proceed from the Department of Justice in November 1982, that the government was able to bring the CCE charge.[5] Thus, even if petitioner had pleaded guilty to the 1982 indictment at the time it was returned, that would not have prevented the subsequent CCE prosecution.

Beyond that, however, petitioner did not plead guilty to the 1982 indictment until April 1983, and in entering his plea petitioner successfully thwarted the government's efforts to resolve in one proceeding both the 1982 charges and the CCE charge. After hastily securing the dismissal of his pending appeal, petitioner insisted that he be immediately allowed to plead guilty to the 1982 indictment notwithstanding the government's request for a continuance of one week in order to obtain a superseding indictment that would have encompassed all of the charges against petitioner. By so doing, as the district court correctly observed (see page 5, *supra*), petitioner, "in effect, opposed the Government's request for a one-week continuance so that [he] could be tried for both the continuing criminal enterprise count and the conspiracy counts at one time." This deliberate strategy on petitioner's part, which necessitated

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[5]That the government did not in fact seek a CCE indictment in November 1982 is of no consequence. At that time, petitioner had filed an interlocutory appeal from the denial of his motion to dismiss the 1982 substantive and conspiracy charges on double jeopardy grounds. Because a CCE charge would also have been prohibited if petitioner had prevailed on his conspiracy argument (see Pet. App. A7-A8; Tr. 205-208), "the Government was relying on the resolution of the interlocutory appeal" before proceeding on a CCE indictment, and this decision was "not only reasonable but responsible" (see page 5, *supra*).

the separate indictment that is now being challenged and which was plainly calculated to create the present double jeopardy claim, constituted a waiver of his double jeopardy right against successive prosecutions.

Thus, not only did "[t]he government act[] with due diligence in discovering evidence" to support the CCE charge, but it also "was delayed in instituting the charge by [petitioner's] own actions" (Pet. App. A8). The Double Jeopardy Clause does not protect against successive prosecutions that are made necessary by the defendant's "actions [that] prevented the government from trying the * * * charges together" rather than by "prosecutorial or judicial overreaching" (Pet. App. A8). See *Ohio* v. *Johnson*, No. 83-904 (June 11, 1984); *Jeffers* v. *United States*, 432 U.S. at 151-154 (plurality opinion). Any other conclusion would be an affront to fundamental notions of justice and a perversion of the salutary protective purposes of the Double Jeopardy Clause.

3. Relying on *United States* v. *Raddatz*, 447 U.S. 667 (1980), petitioner also objects (Pet. 13-16) that the courts below erred in holding that he was not entitled to a full evidentiary hearing on his double jeopardy claim. *Raddatz*, however, concerned the wholly different issue of the authority of a district court to review the determinations of a magistrate who had conducted an evidentiary proceeding; it did not address the distinct question whether the decisionmaker is required to hold a hearing in the first instance.

Here, the district court had not only been involved in this case but had also presided over two trials of petitioner's co-conspirators, and therefore it was, as the court of appeals concluded (Pet. App. A7), "intimately familiar" with the relevant background and evidence. Based on that familiarity, the district court made the determination,

affirmed by the court of appeals, that there were no disputed issues of fact material to the disposition of petitioner's motion to dismiss. That fact-bound conclusion, concurred in by both lower courts, does not warrant this Court's review. And while challenging the evidentiary basis for the "due diligence" ruling, petitioner even now has failed to point to any material factual issues bearing on the district court's alternative holding, which is sufficient to sustain the judgment below, that he waived his double jeopardy claim by opposing the government's request for a brief continuance that would have allowed all of the charges to be resolved in one proceeding.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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No. 84-997

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UNITED STATES OF AMERICA,

Respondent.

REPLY BRIEF

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No. 84-997

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REPLY BRIEF

INTRODUCTION

Petitioner has placed before this Court the relatively uncomplicated claim that his double jeopardy rights should not be denied without an evidentiary hearing to resolve disputed factual issues. Aside from determining the impact of pending decisions before this Court on this case, this Petition raises the purely legal question of whether the Ninth Circuit was correct in holding that the trial court could apply the "due diligence" exception to the double jeopardy claim without conducting an evidentiary hearing. The Ninth Circuit's refusal to require an evidentiary hearing flies in the face of this Court's plurality and dissenting decisions in *United States v. Raddatz,* 447 U.S. 667 (1980) as well as the decisions of the Ninth Circuit and other circuits, all of which require that factual disputes on pretrial motions be resolved by considering evidence and live testimony.

The simple legal issues of whether Petitioner has the right to an evidentiary hearing is obscured by the Brief for the United States in Opposition (hereinafter cited as Bf.Opp.). One source of confusion is the government's injection of the waiver issue into this appeal, Bf.Opp. at 8-9, despite the fact that the waiver question was not raised by the certiorari petition nor by the Ninth Circuit which explicitly refused to decide the waiver issue, Petition for Writ of Certiorari-Appendix at A8 (hereinafter cited as Pet.Cert.). Further confusion arises from the government's misguided treatment of the record in this case as a set of well-established facts. In fact, there is no record in any conventional sense but merely a series of in-court developments surrounded by disputed factual issues. Petitioner does not request that this court resolve those disputed factual issues; Petitioner merely requests that this Court decide the legal question of whether disputed factual issues relating to double jeopardy protections should be resolved at an evidentiary hearing as required by the opinions in *Raddatz.*

In a final attempt to needlessly complicate the issues raised by this petition, the government seems to argue that the pending decision of this Court in *Garrett v. United States,* No. 83-1842, may result in a holding that the §846 and §963 conspiracy offenses in this case are not lesser included offenses within the CCE. This argument is foreclosed by the government's concession at the trial and appellate level that the 1982 conspiracy charges to which Petitioner pled guilty are the same offense as the CCE offense. Pet.Cert. at A6. This concession was compelled by the clear dictates of *Jeffers v. United States,* 432 U.S. 137 (1977) and the facts pleaded in the two indictments which demonstrate the absence of any factual distinction between the activities charged in the two conspiracies and those charged in the CCE count. The 1982 conspiracy indictment

specifically incorporates all but two of the transactions set out in the CCE count, Appellant's Opening Brief (Ninth Circuit) at 7 n.3, and all of the activities in the two indictments were alleged to be the product of a single conspiratorial entity, *id.* at 7-8.

I.
INAPPLICABILITY OF WAIVER DOCTRINE TO THE INSTANT CASE

For reasons not immediately apparent, the government wishes to have this Court consider a waiver issue not raised by the certiorari petition or by the Ninth Circuit decision which is the subject of the petition. Bf.Opp. at 8-9. Although the district court's ruling referred to both the "due diligence" exception and the waiver doctrine, the Ninth Circuit relied exclusively on the "due diligence" exception and stated: "Accordingly we need not consider the waiver issue." Pet.Cert. at A8. The government's injection of a waiver question extraneous to the matters raised by the Petitioner and the Ninth Circuit, should not obscure the simple legal question of whether Petitioner was entitled to a hearing at which the district court would consider evidence and live testimony on disputed factual issues.

Despite Petitioner's doubts as to the materiality of the waiver issue, the government's injection of this issue into the case requires some response. A brief examination of the factual and legal difficulties in applying the waiver doctrine will demonstrate why the Ninth Circuit eschewed any reliance on that doctrine.

A. Factual Record for Waiver Issue

In denying Petitioner's double jeopardy claim, an alternative holding of the district court was that Petitioner's actions in April 1983, constituted a waiver of double jeopardy rights. To briefly recapitulate the relevant procedural developments, Petitioner had been

indicted on August 3, 1982 with conspiracy counts alleging violations of 21 U.S.C. §846 and §963. On November 2, 1982, Petitioner filed a notice of appeal from an order denying his double jeopardy motion to dismiss the conspiracy counts. On April 5, 1983, Petitioner withdrew his appeal and on April 6, pled guilty to the charges in the 1982 indictment. On August 24, 1983, the instant CCE indictment was filed. The district court concluded that Petitioner had suddenly withdrawn his appeal with the intent to avoid a CCE indictment and that by making this tactical decision, Petitioner gave up his right to have the CCE offense and the 1982 conspiracy charges tried together. Appellant's Excerpt of Record (Ninth Circuit) at 365 (hereinafter cited as E.R.).

Even this simple skeletal framework is replete with ambiguities and disputed factual issues which should have been resolved at an evidentiary hearing. The most significant disputed factual issue was the intent element of the wiaver doctrine which requires a "voluntary knowing relinquishment of a right." *Green v. United States,* 355 U.S. 184, 191 (1957). Although intent issues are generally so inherently factual in nature as to require live testimony, *see Poller v. Columbia Broadcasting System,* 368 U.S. 464, 473 (1962); *Central Natl. Life Ins. v. F. & D. Co. of Md.,* 626 F.2d 537, 540 n.6 (7th Cir. 1980), the district court found that Petitioner entertained the requisite intent for waiver without hearing any live testimony by Petitioner or anyone else. In reality, the district court's holding on waiver was not based on any evidence of intent but was based on an impermissible inference of waiver from a silent record, *see Boykin v. Alabama,* 395 U.S. 238, 243 (1969).

Another factual issue requiring live testimony arose from Petitioner's action (or inaction) at proceedings on April 6, 1983. At those proceedings, the prosecutor

requested a continuance of the guilty plea. Petitioner had no response to this request other than to state, through counsel, that he was present to plead guilty. E.R. at 91-96. Despite the absence of any objection or argument by Petitioner opposing the continuance, the district court denied the prosecution's continuance request.[1] Again from a silent record involving no affirmative act by Petitioner but only at best a failure to act, the district court drew an impermissible inference of waiver. *See United States v. Brown*, 188 F.Supp. 624, 625 (S.D.N.Y. 1960). However, it is not this Court's role to pass judgment on the merits of this inference but to insist that this inference be based on live testimony rather than a nonexistent record.

B. Inapplicability of Waiver Under this Court's Decisions

The difficulties in applying waiver to this case multiply geometrically when analyzed in the light of this Court's decisions in *Jeffers v. United States,* 432 U.S. 137 (1977) and *Sanabria v. United States,* 437 U.S. 54 (1978). In *Jeffers,* the plurality held that by opposing a prosecution motion to consolidate separate §846 and §848 indictments, the defendant waived any double jeopardy objection to the §848 indictment following conviction on the lesser included §846 offense. The language of the plurality opinion[2] specifically indicates that waiver cannot be applied where the prosecution bears *any* responsibility for the multiple indictment situation:

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[1]It is noteworthy that the government's brief before this court refrains from any assertion that Petitioner explicitly opposed the continuance request. Bf.Opp. at 3.

[2]Because the plurality opinion in *Jeffers* was adopted by only four justices, the equal split among the justices on the waiver issue has created doubt in the lower courts as to the validity of the *Jeffers* waiver theory. *United States v. Kalish,* 690 F.2d 1144, 1153 n.8 (5th Cir. 1982).

> The considerations relating to the propriety of a second trial obviously would be much different *if any action by the Government contributed to the separate prosecutions* on the lesser and greater charges. No hint of that is present in the case before us, since the Government affirmatively sought trial on the two indictments together. [emphasis added]

Jeffers v. United States, supra, 432 U.S. at 153 n.20. *See also id.* at 155 (noting that defendant was "solely responsible" for the multiple prosecutions).

In complete disregard of the precise language of *Jeffers,* the district court applied the waiver doctrine by balancing the relative "fault" of the parties rather than determining whether the prosecution bore some responsibility for the multiple indictment situation. E.R. at 359-60. Moreover, this erroneous standard was applied without the benefit of live testimony to resolve conflicting factual contentions that shed light on the issue of "fault."[3]

An equally important error in the district court's ruling was the failure to acknowledge the fundamentally different procedural postures of *Jeffers* and this case. *Jeffers* involved a defendant's objection to consolidation of an existing §846 charge with an existing CCE charge. In the instant case, there was no CCE charge in existence which could have been consolidated when Petitioner pled guilty on April 6, 1983. Petitioner had been waiting since November 1981 for the CCE charge to be filed and the government acknowledged and the court found that after October 1982 the prosecution had all of the evidence necessary to convict. It was not just a matter of waiting a few days; the CCE indictment was not filed within

[3] *Cf. Mitchell v. W.T. Grant, Co.,* 416 U.S. 600 (1974) (due process required full hearing when state garnishment statute requires a showing of "fault" on the debtor's part).

5 days, or 30 days or even 90 days of this April guilty plea. The fallacy of the lower court's waiver theory was that not only was Petitioner expected to delay his guilty plea to permit consolidation with a CCE charge that did not exist but that he would have to delay the plea until August 24, 1983, more than four and a half months after the April 6, 1983 guilty plea.[4]

The district court also disregarded this Court's decision in *Sanabria v. United States*, 437 U.S. 54 (1978) in which the *Jeffers* waiver theory was limited to cases where the defendant secures separate trials of the lesser and greater offenses by claiming that they are distinct offenses and specifically electing separate trials.[5] *Id.* at 77-78. In the instant case, *Sanabria* precluded a waiver finding because Petitioner never argued that the CCE offense was distinct from the lesser included conspiracy offenses nor for separate trials.

II.
PREDOMINANCE OF FACTUAL DISPUTES REQUIRING AN EVIDENTIARY HEARING

One disturbing aspect of the Brief of the United States in Opposition is that it treats this case as if it had a factual record derived from a meaningful adversary

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[4]In this case, the district court's waiver decision was fundamentally illogical because it found a waiver of double jeopardy rights on April 6, 1983 even though no double jeopardy right existed on that date. There was no CCE charge in existence at the time of the April 6 plea and in the absence of multiple indictments, no double jeopardy claim could exist. *See generally, Albernaz v. United States,* 450 U.S. 333, 334-45 (1981). Petitioner was in no position to assert any double jeopardy right on April 6, 1983; that right would not exist until four months later when the CCE indictment was filed.

[5]In *Sanabria,* this Court rejected the government's argument that the defendant waived the right to avoid a separate trial for a "numbers" theory of liability for a violation of 18 U.S.C. §1955 liability. *Sanabria* held that *Jeffers* was inapplicable because the defendant had not claimed that the horse betting and numbers

hearing. The government discusses numerous matters as if they were established facts even though Petitioner was given no opportunity to present exhibits or live testimony or cross-examine prosecution declarants. Indeed, the only undisputed facts relate to in-court developments and virtually all other facts, including those relating to the parties' intent, motives, diligence in investigating the case or responsibility for separate prosecutions, are disputed by the parties.

As discussed in the certiorari petition, the district court's refusal to consider evidence including live testimony on disputed factual issues cannot be reconciled with the views of this Court as expressed in the plurality and dissenting opinions in *United States v. Raddatz*, 447 U.S. 667 (1980), Pet. Cert. at 13. All of the opinions in *Raddatz* indicate that live testimony on factually disputed pretrial motions should be considered at some point in the litigation process. *Id.* at 14 n.9. In the context of double jeopardy motions, the right to an evidentiary hearing on disputed factual issues has been acknowledged by the Ninth Circuit and other circuit courts. *Id.* at 14-15; *United States v. Flick*, 716 F.2d 735, 739 (9th Cir. 1983);[6] *United States v. Beachner Construction Co.*,

theories of liability were distinct offenses and therefore had not argued for separate trials. *Id.* at 77-78. Further, the Court noted that the defendant does not waive his double jeopardy protection whenever his motion produces a trial court error in his favor. *Id.* at 79.

[6]*Flick* remanded to the district court because the record was inadequate to determine whether two conspiracy indictments charges the same offense. The court commented that the record was "extremely sparse" in part because "[m]uch of the information before us regarding critical factual issues comes from the conflicting representations of counsel at oral argument," *United States v. Flick, supra*, 716 F.2d at 739. The court then remanded the case to the district court with the suggestion that "[t]he district court should consider the appropriateness of holding an evidentiary hearing in order to resolve any disputed facts material to resolution of those claims." *Id.*

Inc., 729 F.2d 1278, 1283 & n.10 (10th Cir. 1984).[7]

Nothing in *Raddatz* or any of the double jeopardy cases indicates that a district court can subjectively decide that it is "intimately familiar" with the case and set aside its obligation to consider live testimony on disputed factual issues. Neither the Ninth Circuit decision in this case nor the government's brief cite any authority to support the "intimate familiarity" exception to the double jeopardy and due process rights of the accused, the theory adopted by the Ninth Circuit in this case, Pet.Cert. at A7. The erroneous concoction of this unprecedented "intimate familiarity" exception is compounded by the Ninth Circuit's application of a "clearly erroneous" standard of appellate review for factual findings reached without considering live testimony.[8]

Even if some nebulous "intimate familiarity" exception existed, this case would be a particularly inappropriate application of that exception since most of the disputed factual issues took place outside of the court's presence. Contrary to the impression created by the government, the district court did not take evidence on the motion, Bf.Opp. at 4, but spent much of its time refusing to take evidence under the patently erroneous assumption that Petitioner and the prosecution concurred on the facts.[9] At both the trial and appellate level, Petitioner

[7]The instant case is fundamentally different from the Ninth Circuit "due diligence" decision in *United States v. Stearns*, 707 F.2d 391 (9th Cir. 1983) in that an evidentiary hearing was held in *Stearns* and the appellant courts were asked to decide the factual merits of the case. In the instant case, this Court is being asked to decide the purely legal question of whether Petitioner was entitled to an evidentiary hearing and the factual merits are not at issue.

[8]Contrary to the government's suggestion, Bf. at 9-10, the Ninth Circuit did not affirm the trial court's finding that there were not disputed facts but excused the lack of an evidentiary hearing under the "intimate familiarity" theory.

[9]The district court reached a finding that there was insufficient evidence of a CCE until November 1982, *id.*, a finding made while

has specified factual conflicts pertaining to the due diligence issue, Pet. Cert. at 11 n.7[10] and the waiver issue. In a case replete with these factual disputes, there is no sound policy justification for relying on a court's subjective feeling of intimate familiarity with a case as a substitute for the long-established judicial procedure of holding evidentiary hearings to resolve factual disputes.

CONCLUSION

Petitioner does not request that this Court resolve the merits of the many factual disputes in this case. The certiorari petition merely seeks this Court's vindication of his right to adequately present his double jeopardy case in the lower courts on the disputed factual issues. Without the opportunity to present documentary evidence, live testimony and cross-examine government witnesses, Petitioner will never have anything resembling his "day in court."

Respectfully submitted,

LAW OFFICES OF BARRY TARLOW
Barry Tarlow

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refusing to consider any live testimony to establish what evidence the prosecution had and what investigative steps were taken to secure evidence. The district court also found that the government's delay were reasonable and responsible without conducting an evidentiary hearing to determine what motivated those delays. While the government contends that it delayed filing the CCE charge from November 1982 to April, 1983 because it feared that the interlocutory appeal would affect the CCE charge, Petitioner contended that this was not the government's actual motive for delay and was never able to present physical evidence and live testimony on this issue.

[10]For example, in conflict with the district court's finding that the prosecution had insufficient evidence of a CCE offense before November 1982, Petitioner refused to stipulate to that fact and repeatedly offered to show that the prosecution had sufficient evidence within the first few months of 1982. *Id.* Petitioner also disputed the finding as to the date of the Justice Department's oral approval of the CCE prosecution. *Id.*

PROOF OF SERVICE BY MAIL

State of California

ss.

County of Los Angeles

I, the undersigned, say: I am and was at all times herein mentioned, a citizen of the United States and a resident of the County of Los Angeles, over the age of eighteen (18) years and not a party to the within action or proceeding; that my business address is 11333 Iowa Avenue, Los Angeles, California 90025; that on March 8, 1985, I served the within *Reply Brief* in said action or proceeding by depositing true copies thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Los Angeles, California, addressed as follows:

Clerk, U.S. Supreme Court
One First Street, N.W.
Washington, D.C. 20543
(Original and forty copies)

Solicitor General
Department of Justice
Washington, D.C. 20530

Raymond Edwards, Jr., U.S. Attorney
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San Diego, California 92189

I declare under penalty of perjury that the foregoing is true and correct. Executed on March 8, 1985, at Los Angeles, California.

Robin J. McColgan
Original signed)